Case referred to:—

(1) *Barclay's Bank Ltd. v. Roberts* (1954) 1 W.L.R. 1212.

CIVIL REVISION.

Ong Huck Lim (*Lim Huck Aik* with him) for the plaintiff.

H. E. P. Powell for the petitioner.

Cur. Adv. Vult.

Spenser Wilkinson J.: — The plaintiff is the landlord of No. 7 Ayer Itam Road, Penang and sued the defendant, who was the tenant, for possession of the premises. Judgment was given in the Magistrate's Court against the defendant for possession. The defendant stated in evidence during the hearing that he had no sub-tenants and so the learned Magistrate, in my view quite properly, made no declaration in his Order as to whether or not the sub-tenants were bound thereby.

Execution was issued in respect of the premises but when the bailiff came to take possession he found persons other than the defendant and his family in occupation. A Notice was then issued by the bailiff and served upon the premises calling upon the occupiers to quit the premises on or before the 9th September, 1954, failing which force would be used to eject them. Thereupon the Petitioner, who claims to be a lawful sub-tenant, applied to the High Court for revision.

At the hearing before me Mr. Ong Huck Lim for the landlord submitted that the procedure adopted by the petitioner in applying for revision was wrong and that he should have applied for relief to the Magistrate's Court on the analogy of O.27 of the Subordinate Courts Rules 1950 which provides for objection proceedings in cases where a third party claims goods seized in execution. He invited me, therefore, to hold that revision proceedings did not lie and to leave the petitioner to commence objection proceedings in the Magistrate's Court.

Unfortunately the Subordinate Courts Rules, like the Rules of the Supreme Court in England, do not make satisfactory provision for implementing the protection afforded by Section 14 of the Rent Control Ordinance to lawful sub-tenants. The kind of difficulty which may arise in England is indicated in the judgments of the Court of Appeal in *Barclay's Bank Ltd. v. Roberts*[1] in which an amendment to O.47, r.1 of the English Rules was recommended. Whilst it is true that O.1, r.2 of the Subordinate Courts Rules gives wide powers to the Courts to adapt the procedure to special circumstances I think that difficulties similar to those met with in England are likely to continue here unless some modification is made to paragraph (d) of O.21, r.8 and to O.21, r.14(2) of the Subordinate Courts Rules and I feel impelled to suggest, therefore, that early consideration should be given by the appropriate authority to such amendments and possibly also to an amendment of O.27.

In the meantime I think the Notice given by the bailiff in this case was defective because it gave no indication to the sub-tenants of the proper steps to take to avoid ejectment. I think the notice to be served upon occupiers of premises in cases of this kind should call upon them to apply to the Court which issues the notice within a specified time. In a case where a person claiming to be a sub-tenant had been given a clear indication of the procedure he should adopt and had ignored that indication I would hesitate to act in revision.

In the present case I do not think any good purpose would be served by forcing the petitioner to make a fresh start by way of objection proceedings; and I do not think that in the circumstances the petitioner can be blamed for adopting a procedure which was clearly open to him, especially as in a recent case revision proceedings had been successful in somewhat similar circumstances.

I therefore order that this case be remitted to the Magistrate's Court for the petitioner to be heard and for determination of the question whether or not the petitioner is a sub-tenant who is entitled to the protection of the Rent Control Ordinance. The Magistrate's Court should follow as nearly as possible the procedure laid down in O.27, r.5 as though the petitioner had filed a valid objection and the plaintiff had contested it.

Order accordingly.

Solicitors: *Huck Aik & Cheng Hock; H. E. P. Powell & Co.*

Re YEAP CHOR EE, Decd. LEE CHENG KIN (w) & ORS. v. YEAP KIM HOE & ANOR.

[O. C. J. (Spenser Wilkinson J.) November 5, 1954]

[Penang — Originating Summons No. 61 of 1954]

Will — Gift of personal property — Shares — Imperfect gift — Whether donor has made himself a trustee for the donee.

The question which arose in this Originating Summons was whether a deed of settlement made by the testator Yeap Chor Ee, decd. constituted a good and valid gift of certain shares. The material parts of the deed are as follows:—

"WHEREAS the Settlor is the owner of two thousand (2,000) shares of $100 each fully paid-up in Ban Hin Lee Bank Ltd. having its registered office at No. 43 Beach Street, Penang.

AND WHEREAS in consideration of the natural love and affection of the Settlor for the donee hereinafter mentioned the Settlor is desirous of assigning the said shares to the Trustees to be held by them the trusts hereinafter mentioned.

NOW THIS INDENTURE WITNESSETH as follows:—

1. That for the purposes of effectuating the said desire and in consideration of his natural love and affection for the donees hereinafter mentioned the Settlor hereby assigns unto the Trustees the said two thousand (2,000) shares of $100 each fully paid-up in the Ban Hin Lee Bank Ltd. absolutely TO HOLD the same UPON TRUSTS for all the sons . . . . ."

No transfer of the shares in question was in fact made out and on the death of the testator the deed of settlement was found in his safe.

Held: (1) in so far as the deed of settlement in this case purported to be a gift by way of transfer to the trustees mentioned therein it was an imperfect transaction and therefore had no effect; (2) as by the deed of settlement the testator had declared that he held the property in trust, the trust was good and therefore the testator had constituted himself and himself only the trustee of the sons for the persons mentioned as beneficiaries.

Cases referred to:—

(1) *Milory v. Lord* 45 E.R. 1185.

(2) *Richards v. Delbridge* 18 Eq. 11 at p. 14.

(3) *Moore v. Moore* 18 Eq. 474 at p. 478.

ORIGINATING SUMMONS.

R. D. Hume for the plaintiffs.

F. G. Pooley for the defendants.

Khoo Eng Cheang for Senior Asst. Registrar, Penang for all the beneficiaries under the Will.

Cur. Adv. Vult.

Spenser Wilkinson J. : —This is an application by the executors and trustees of the Will of Yeap Chor Ee deceased to determine whether a Deed of Settlement dated the 30th December, 1946 made by the deceased constituted a good and valid gift of 2,000 shares of $100 each in the Ban Hin Lee Bank Ltd. and for consequential orders thereon. The Indenture in question was made between Yeap Chor Ee of the one part and Yeap Chor Ee, Goh Hock Siew, Yeap Kim Hoe and Yeap Hock Hin of the other part. The material parts of the Indenture for the purposes of this application are as follows :—

"WHEREAS the Settlor is the owner of two thousand (2,000) shares of $100 each fully paid-up in Ban Hin Lee Bank Limited having its registered office at No. 43 Beach Street, Penang.

AND WHEREAS in consideration of the natural love and affection of the Settlor for the donees hereinafter mentioned the Settlor is desirous of assigning the said shares to the Trustees to be held by them the trusts hereinafter mentioned.

NOW THIS INDENTURE WITNESSETH as follows:—

1. That for the purposes of effectuating the said desire and in consideration of his natural love and affection for the donees hereinafter mentioned the Settlor hereby assigns unto the Trustees the said two thousand (2,000) shares of $100 each fully paid-up in the Ban Hin Lee Bank Limited absolutely TO HOLD the same UPON TRUSTS for all the sons . . . . ."

There is no dispute that the sons in whose favour this document purported to be would in the events which have happened be Yeap Leong Huat, the son of Yeap Hock Hoe by his wife Hooi Kam Chee and Yeap Leong Thiam and Yeap Leong Keng, the sons of Yeap Hock Hoe by his wife Yap Kim Lean.

After execution of the Deed of Settlement it was kept by Goh Hock Siew, one of the trustees named therein and a Director and Manager of the Bank, in his safe together with the Share Certificate Book. On the death of Goh Hock Siew the Deed of Settlement was placed in the testator's safe and the Book of Certificates in the safe of Yeap Hock Hin, also one of the trustees of the Settlement. No transfer of the shares in question was ever made and on the death of the testator in May, 1952 the Deed of Settlement was found in his safe and the Book of Certificates was still in Yeap Hock Hin's safe. The testator was in fact the registered owner of more than 2,000 shares of $100 each in Ban Hin Lee Bank Ltd.

Reference was made in the course of the arguments before me to three other Deeds of Settlement made by the same testator on various dates prior to the Settlement in question, each dealing with certain shares in the same Bank and all in somewhat different terms from the Settlement now in question. In my opinion the terms of these other Deeds are of no assistance to me in construing the Deed now before me, which must be construed, I think, solely from a consideration of its wording and the fact that no transfer of the shares was executed.

There is really only one point to be decided in this matter, which can, I think, be fairly summarised in this way: Do the facts of this case bring it within the principle of the case of *Milroy v. Lord*[1] and the very large number of cases in which that decision has been followed, or are the circumstances of the present case sufficient to distinguish it so that the principle of that case does not apply?

Mr. Khoo Eng Cheang, who appeared for the Senior Assistant Registrar as representing all the beneficiaries under the Will of the deceased, in a careful argument cited a large number of authorities but his argument really rested upon the decision in *Milroy v. Lord*[1]. The particular passage from the judgment of Lord Justice Turner upon which he relied reads as follows :—

"I take the law of this Court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything, which,

according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the person for whom he intends to provide, and the provision will then be effectual and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but in order to render the settlement binding one or other of these modes must, as I understand the Law of the Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift. The cases, I think, go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust. These are the principles by which, as I conceive, this case must be tried."

This passage has been quoted and followed on numerous occasions and there is in my opinion no doubt whatever that in so far as the Deed of Settlement in this case purports to be a gift by way of transfer to the trustees named therein it is an imperfect transaction.

Mr. Pooley on behalf of the trustees of the Settlement contended that the present case is not governed by the decision in *Milroy v. Lord*[1], because here the Settlor deliberately made himself a trustee of the shares in question in favour of the beneficiaries named. Part of the headnote of the case of *Milroy v. Lord*[1] reads as follows :—

"**Held**, that as it was not the intention of the settlor to constitute himself a trustee of the shares, but to vest the trust in S.L. there was no valid trust of the shares created in the settlor."

I think this part of the headnote is a fair representation of the effect of the decision and is supported by that part of the passage from the judgment of Turner L.J. quoted above which reads :—

"It will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes."

In the present case it was argued that it was the intention of the Settlor to constitute himself a trustee of the shares and that by the express terms of the Settlement he did so constitute himself as a trustee. In support of this argument Mr. Pooley pointed out :—

(a) That Yeap Chor Ee in addition to being the Settlor named himself one of the four trustees;

(b) That the second recital expresses a clear intention that the shares are to be held upon the trusts hereinafter mentioned;

(c) That the first clause of the Indenture states that for the purpose of effectuating the Settlor's desire the shares are to be held upon trust for all the sons; and

(d) That the Settlor not only executed the Deed as Settlor but also executed it again a second time and that this second execution must have been in his capacity as trustee.

In the course of the arguments I was to some extent in doubt as to whether it was possible for the same Deed to be at the same time a purported transfer of the property and also a declaration of trust in view of the clear distinction which the authorities draw between the two classes of transaction. *In Richards v. Delbridge*[2] Jessel M.R. said :—

"A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership . . . . . ; or the legal owner of the property may, by one or other of the modes recognised as amounting to a valid declaration of trust, constitute himself a trustee . . . . . It is true he need not use the words, 'I declare myself a trustee', but he must do something which is equivalent to it, and use expressions which have that meaning; . . . . . for a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift shew an intention to give over property to another, and not to retain it in the donor's own hands for any purpose, fiduciary or otherwise."

In *Moore v. Moore*[3] the Vice-Chancellor said :—

"I do think it very important to keep a clear and definite distinction between cases of imperfect gift and cases of declaration of trust, and that we should not extend beyond what the authorities have already established, declarations of trust, so as to implement and supply what, according to decisions of the highest authority, would otherwise be imperfect gifts."

He goes on in the next paragraph :—

"There seems to have been a notion that you may have a trust declared where the gift is imperfect, although the donor never meant to be a trustee at all."

I think these last words make it clear that although you cannot turn an imperfect gift into a trust in order to validate it in cases where the donor never meant to be a trustee at all the matter is different in a case where the donor did intend to be a trustee.

After careful consideration of all the authorities cited and the terms of the Deed itself I have come to the conclusion that the result of the execution of this Deed without any transfer of the shares themselves is as follows :—

(a) The purported transfer of the shares to the trustees Goh Hock Siew, Yeap Kim Hoe and Yeap Hock Hin not having been completed by any transfer of the property to them was both an ineffectual transfer and an incomplete appointment of trustees and so did not create them trustees;

(b) Independently, however, of this purported transfer, which has failed, there is the clearest possible intention expressed by the Settlor to make himself a trustee of these shares in favour of the beneficiaries therein mentioned and that (following the expression used in the above quoted passage from **Richards v. Delbridge**[2]) although he has not used the actual words "I declare myself a trustee" he has done something which is equivalent to it and has used expressions which have that meaning.

The case before me is an unusual one in which the document in question appears to be both a declaration of trust by the Settlor as well as a purported gift by way of transfer. No decided case was cited to me in which a settlor having used such strong words of trust,

the Court has refused to enforce the trust, and the case of *Milroy v. Lord*[1] appears to me to contain the clearest implication that where the settlor declares that he holds the property in trust for certain purposes the trust will be held good.

In the result I hold that Yeap Chor Ee deceased by this Deed of Settlement constituted himself and himself only a trustee of these 2,000 shares of $100 each for the persons described in clause 2 of the Deed who are the persons mentioned in the earlier part of this judgment. I will hear further argument as to the form of the order to be made as a result of this decision.

Order accordingly.

Solicitors: *Presgrave & Matthews; Hogan, Adams & Allan.*

HARNAM SINGH v. K. V. SAMBASIVAM

[A. C. J. (Spenser Wilkinson J.) November 15, 1954]

[Penang — Civil Appeal No. 8 of 1954]

Courts Ordinance, 1948 — Claim for possession of plank and attap house — Jurisdiction of Magistrate's Court — Meaning of "immovable property" — Interpretation and General Clauses Ordinance, 1948.

The question raised in this appeal was whether the Magistrate's Court had jurisdiction to deal with a claim for possession of a plank house with attap roof.

Held: the Magistrate's Court had no jurisdiction because if the house was immovable property the Magistrate had no jurisdiction because of the dispute as to title, and if the house was movable property the Magistrate had no jurisdiction because the subject matter of the action was over $1,000.

Cases referred to:—

(1) *Kartar Singh v. Pappa* (1954) M.L.J. 193.

(2) *Kiah binti Hanapiah v. Som binti Hanapiah* (1953) M.L.J. 82.

CIVIL APPEAL.

Eusoffe Abdoolcader for the appellant.

The respondent in person.

Cur. Adv. Vult.

Spenser Wilkinson J. : — The appellant, who was the plaintiff in the Court below, claimed possession of a house No. 365 Main Road, Prai, which is described as a plank house with an attap roof.

The respondent's defence was that the house in fact belonged to him and that a bill of sale of the house which on the face of it purported to be an out-and-out sale of the house to the appellant, was in fact a bill of sale by way of security.

In addition to the bill of sale there was also a tenancy agreement signed by the respondent in favour of the appellant which the defendant claimed had been signed by him under duress.

The learned Magistrate who tried the case decided that the bill of sale was a bill of sale by way of security and that the tenancy agreement had been signed under duress and dismissed the suit with costs on these grounds.

The appellant raised 17 grounds of appeal but as, in view of my decision, the case may come before the Courts again I express no opinion at all on the merits and will deal only with the points raised regarding jurisdiction.

The seventh ground of appeal was to the effect that the Magistrate had exceeded his jurisdiction because his decision in favour of the respondent was in effect a declaration that the alleged bill of sale was not a sale but a document of security and that the tenancy agreement was void and ought to be set aside. Whilst it is not necessary for me to decide this ground of appeal I do not think there is much substance in it. Fraud and duress were pleaded as defences and not as counterclaims, and I do not feel inclined to accept the proposition that the dismissal of a claim on a contract because it was induced by fraud or duress amounts to a declaratory judgment. Although it appears to me that the kind of questions which arose in the Magistrate's Court in this case were more suitable to be dealt with by the High Court because of the difficulty of the points of law involved and also because of the importance of fraud being specifically and fully pleaded I think the appellant's remedy in this respect would have been to apply under sub-section (2) of Section 66 of the Courts Ordinance (which by reason of Section 93 applies to a Magistrate's Court) for the transfer of the case to the High Court.

My decision in this appeal rests on the first ground of appeal, which was that the learned Magistrate had no jurisdiction to hear the case as there was a *bona fide* question of title involved and that the proceedings were, therefore, a nullity.

In considering this ground of appeal a preliminary question arises as to whether the house in question is movable or immovable property within the meaning of the provisions of the Courts Ordinance. Mr. Abdoolcader for the appellant pointed out that there was no definition in the Courts Ordinance of the expression "immovable property." There is, however, a definition of "immovable property" in the Interpretation and